BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JOHN ELLIOTT GRAHAM	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,006,954
DOKTER TRUCKING GROUP and	)	
SOLDIER CREEK TRANSPORTATION	)	
Respondents	)	
AND	)	
	)	
UNION INSURANCE COMPANY and	)	
CONTINENTAL WESTERN INSURANCE	)	
COMPANY	)	
Insurance Carriers	)	

ORDER

Respondents Dokter Trucking Group and Soldier Creek Transportation appeal the March 30, 2005 Award of Administrative Law Judge Bryce D. Benedict. The Workers Compensation Board (Board) heard oral argument on September 27, 2005.

APPEARANCES

Claimant appeared by his attorney, Frederick J. Patton, II, of Topeka, Kansas. Both respondents Dokter Trucking Group and Soldier Creek Transportation and their insurance carriers appeared by their attorney, Nathan D. Burghart of Topeka, Kansas. Respondent Soldier Creek Transportation further appeared by Patrick R. Barnes of Topeka, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge (ALJ). The parties acknowledged at oral argument before the Board that the Affidavit of Charlene K. Nesmith, submitted to the Board, was not timely submitted into evidence to the ALJ and, therefore, has not been considered by the Board for the purposes of this appeal.

ISSUES

1. What is the nature and extent of claimant's injury and disability? What is claimant's correct functional impairment? What is claimant's appropriate permanent partial general disability? And did claimant put forth a good faith effort in his attempt to obtain employment after his injury?

2. Did the ALJ err in determining that Dr. James D. Seeman is the authorized treating physician?

3. Did the ALJ err in determining that respondent is obligated to pay for the medicines prescribed by Dr. Seeman?

4. Did the ALJ exceed his jurisdiction and err in refusing to extend respondents' terminal date?

5. What is claimant's average weekly wage and resulting compensation rate?

6. Is claimant entitled to temporary total disability compensation from November 26, 2002, to January 7, 2003?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed.

The Award of the ALJ sets out findings of fact and conclusions of law in some detail and it is not necessary to repeat those herein. The Board adopts those findings and conclusions as its own.

Claimant, an employee of Soldier Creek Transportation (Soldier Creek), was leased by respondent Soldier Creek to respondent Dokter Trucking Corporation (Dokter Trucking).

Claimant suffered accidental injury on February 25, 2002, when a gust of wind blew him off the top of a semi-trailer truck, and he injured his right arm, right leg and neck. Claimant acknowledges the arm and leg injuries eventually resolved, but he continued with ongoing neck pain and headaches. As a result of that injury, claimant has seen a number of medical providers, including Dr. John C. Davis, a chiropractor at the Davis Chiropractic Group; Dr. Seeman; Dr. Bernard Poole; Dr. Philip Baker; Dr. Daniel D. Zimmerman; and Dr. Chris D. Fevurly. Claimant initially received treatment from Dr. Davis and was taken off work until March 9, 2002, when he was released to return to work without restrictions. He was later referred to Dr. Poole as he continued to experience ongoing difficulties.

Dr. Poole first saw claimant on September 30, 2002, at which time he took claimant off work and provided him with ongoing medical care. Dr. Poole released claimant to return to work on October 30, 2002. At that time, claimant returned to work and attempted to perform his job, but was unable to do so for more than a couple of days. He was sent home by his employer.

On December 5, 2002, claimant was seen by Dr. Zimmerman at the request of his attorney. Dr. Zimmerman only examined claimant once, rating him at 18 percent to the body as a whole based upon the fourth edition of the AMA *Guides*[1] using the range of motion model. Dr. Zimmerman reviewed a task list prepared by vocational expert Michael J. Dreiling, finding that claimant suffered a 43 percent loss of task performing ability as a result of his February 25, 2002 injury.

In January 2003, respondent Soldier Creek leased a truck and claimant, as the driver, to a different company (Federal Express) involving work which was much easier and less physically demanding than the work done with Dokter Trucking. On January 7, 2003, claimant returned to work, but only worked until January 20, 2003, and was off again through June 12, 2003, due to neck pain and headaches. On June 12, 2003, claimant returned to work and continues working in pain. However, claimant testified he is only able to work part-time because of the pain he experiences. While working for Dokter Trucking, claimant was paid $0.25 per mile. His pay with the Federal Express job is at $0.35 per mile. Claimant acknowledged that were he working full-time, he would be earning more money than he would have earned while driving the Dokter Trucking routes.

On January 16, 2004, claimant's attorney caused a letter to be provided to respondents' attorney regarding the need for ongoing medical care, including prescription medication. At that time, claimant had apparently gone to the Wal-Mart pharmacy, but was unable to obtain any pain medication. Claimant's attorney requested information regarding whether Dr. Poole remained as the authorized treating physician. There was no response to this communication.

On March 15, 2004, claimant's attorney again wrote to respondents' attorney requesting information regarding the authorized treating physician, specifically to provide prescriptions for claimant's medications. At that time, claimant's attorney advised that Dr. Seeman at the Osage Medical Clinic, claimant's family doctor, would be willing to prescribe medication. Again, no response was received. Claimant, at some point, contacted Duane L. Keim, of Soldier Creek Transportation, Inc., regarding the necessity of medical care. Mr. Keim provided claimant an undated letter, which designates Dr. Seeman as the authorized medical care provider at the Osage Medical Clinic. Mr. Keim advised that since Dr. Seeman was used by respondent Soldier Creek regularly for emergency care, DOT physicals and drug screens, it would only make sense that

[1] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

claimant's primary care physician be located in Osage City, Kansas, and not in Lawrence, Kansas.[2] On September 17, 2004, respondents' attorney advised claimant's attorney that Dr. Fevurly was authorized as the treating physician. In response, claimant's attorney provided respondents' attorney with a copy of the letter from Mr. Keim regarding the authorization of Dr. Seeman. A dispute then arose regarding the authorization of Dr. Seeman.

In workers compensation litigation, it is the claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence.[3]

K.S.A. 44-510h makes it the duty of the employer to provide services of a health care provider as may be reasonably necessary to cure and relieve the employee from the effects of the injury. In this instance, claimant contacted respondents on two separate occasions in January and March of 2004, attempting to obtain authorized care. No response was forthcoming. Claimant contacted respondents and was referred to Dr. Seeman, a doctor well-known to respondent Soldier Creek and used on many occasions for various medical purposes. The insurance company, through its attorney, later objected, attempting to appoint Dr. Fevurly as the authorized treating physician and to de-authorize Dr. Seeman.

The Kansas Supreme Court in *Matney*[4] was asked whether the employer or the insurance company has the right to designate the treating physician. In *Matney*, the claimant, a chiropractor employed by Matney Chiropractic Clinic, suffered an injury and self-designated Dr. Darrell Fore as the treatment provider for his injuries. Matney, who owned all of the stock of the corporate employer, notified the insurance company, State Farm, of the health care designation. In November 1993, the insurance carrier advised that the authorized treating physician was Dr. Ken Wertzberger, and, after November 24, 1993, refused to pay for any of Dr. Fore's treatments. Matney continued to receive treatment from Dr. Fore after that date.

The Kansas Supreme Court, in reversing both the Kansas Court of Appeals and the Workers Compensation Board, ruled that it is the respondent's obligation and right under the statute to appoint the designated treating physician. In discussing the language of K.S.A. 44-532(a), which states "[w]here the payment of compensation of the employee . . . is insured by a policy or policies, at the expense of the employer . . . , the insurer . . . shall be subrogated to the rights and duties under the workers compensation

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[2] Claimant lives in Osage City, Kansas. On September 17, 2004, respondent's attorney advised claimant's attorney that Dr. Fevurly was authorized as the treating physician. Dr. Fevurly's office is in Lawrence, Kansas.

[3] K.S.A. 44-501 and K.S.A. 2001 Supp. 44-508(g).

[4] *Matney v. Matney Chiropractic Clinic*, 268 Kan. 336, 995 P.2d 871 (2000).

act of the employer so far as appropriate. . . .",[5] the Kansas Supreme Court determined that a corporation is a separate entity, authorized under the law to act as a single person distinct from the shareholders who own it. The Court found that the employer is authorized under K.S.A. 1992 Supp. 44-510(a) (the predecessor to K.S.A. 44-510h) to designate a treatment provider for the employee. The Kansas Supreme Court found that the clinic (respondent) in *Matney* acted within its statutory authority when designating Dr. Fore as its employee's (Matney's) treating provider. The insurance carrier was then ordered to pay the charges for the treatment provided by Dr. Fore.

In this instance, the Board finds, based on *Matney*, that the designation by respondent Soldier Creek of Dr. Seeman as the authorized treating physician qualifies under K.S.A. 44-510h as appropriate medical care and that authorization obligates the employer (and its insurance carrier) to pay for the treatment and the medications prescribed by Dr. Seeman.

In considering claimant's average weekly wage, the Board finds the ALJ was correct in finding claimant had an average weekly wage of $498.36. The information in the record indicates claimant earned a total of $12,957.36 during the 26 weeks preceding the accident.

The Board will next consider whether the ALJ erred in refusing to extend respondents' terminal date. This matter went to regular hearing on December 9, 2004. The parties are well aware that this ALJ handles his docket in a manner unique among the administrative law judges. While it could be argued that this docketing procedure is contrary to the statute, no such argument was raised in this case. The ALJ ordered that claimant's terminal date expired as of the date of the regular hearing. The ALJ then traditionally allows a respondent 30 days after the regular hearing to complete its evidence. In this instance, the ALJ extended that to 60 days, which is more than this ALJ normally allows. Respondents, as of the time of the regular hearing on December 9, 2004, had apparently taken no action to schedule their expert medical depositions. When attempting to schedule the deposition of Dr. Poole, respondents ran into scheduling problems. The deposition could not be scheduled until after respondents' terminal date, even taking into consideration the additional 30 days provided by the ALJ. This occurred even though this matter had been scheduled for regular hearing originally on March 18, 2004, rescheduled to May 6, 2004, and ultimately held on December 9, 2004. The notice of the regular hearing was mailed to respondents' counsel on September 1, 2004. Claimant's medical expert was deposed on March 29, 2004, nearly nine months prior to the date of the regular hearing. Respondents' counsel made no attempt to schedule expert depositions until after the December 9, 2004 regular hearing and immediately ran into difficulty scheduling the deposition of Dr. Poole. The ALJ found no good cause for extending the terminals dates, and the Board, in this instance, agrees. A substantial amount of time passed between the

[5] *Id*. at 340.

original scheduling of the regular hearing and the ultimate hearing itself. Ample time existed to schedule the appropriate depositions. The Board does not find good cause for an extension of the terminal dates and does not find that the ALJ erred in refusing to extend the terminal dates. The Board, therefore, affirms the finding by the ALJ that respondents' terminal date should not have been extended.

With regard to the nature and extent of claimant's injury, K.S.A. 44-510e defines functional impairment as,

> . . . the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.[6]

Dr. Fevurly found claimant to have a 15 percent impairment to the body as a whole based upon the DRE Category III under the fourth edition of the AMA *Guides*.[7] He indicated a 5 percent impairment preexisted, but there was no indication that claimant had symptomatic cervical conditions which preexisted his accident. The Board finds the designation by the ALJ that claimant has a 15 percent impairment to the body as a whole on a functional basis should be affirmed.

K.S.A. 44-510e defines permanent partial general disability as,

> . . . the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.[8]

Two task loss opinions are contained in this record. Both utilize the task list created by vocational expert Michael J. Dreiling. Dr. Zimmerman determined that claimant had a 43 percent task loss, with Dr. Fevurly determining that claimant had not suffered a task loss. It is acknowledged in this record that while claimant is performing the same tasks he was performing at the time of the injury, he has limited himself to, because of pain from his injury, 20 hours a week and is, therefore, not performing the tasks as repetitiously or to the same degree as before. Both Dr. Zimmerman and Dr. Fevurly agreed claimant's pain is

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[6] K.S.A. 44-510e(a).

[7] AMA *Guides* (4th ed.).

[8] K.S.A. 44-510e(a).

consistent with his injuries. Moreover, Dr. Fevurly noted if claimant was expected to work 40 hours per week, he would need time off in the middle of the week to recuperate. Lastly, there was no testimony claimant was faking his pain or lack of ability to work full-time. The Board finds the opinion of Dr. Zimmerman to be more credible and affirms the ALJ's determination that claimant has suffered a task loss of 43 percent.

With regard to the wage loss prong of K.S.A. 44-510e, the Board also affirms the finding by the ALJ that claimant is earning less than 90 percent of his wages at the time of accident. The information from June 12, 2003, to September 25, 2004, shows that claimant has earned $25,658.74, for an average weekly wage of $381.32, representing a 24 percent wage loss. In averaging the 43 percent task loss with the 24 percent wage loss, the Board finds that claimant is entitled to a permanent partial general disability of 33.5 percent. The Board, therefore, finds that the Award of Administrative Law Judge Bryce D. Benedict dated March 30, 2005, should be affirmed in all respects.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Bryce D. Benedict dated March 30, 2005, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of November, 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

The undersigned respectfully dissents with regard to whether claimant put forth a good faith effort to obtain employment after his injury. Claimant was returned to work with

respondent Soldier Creek and is currently working a job which pays $0.35 per mile, which is an increase of 67 percent over that which he was earning on the date of accident. Claimant acknowledged that if he were working full-time, his average weekly wage would exceed the average weekly wage he was earning with respondent. Under K.S.A. 44-510e, he would be making wages equal to 90 percent or more of the average gross weekly wage he was earning at the time of the injury and would be limited to his functional impairment. Claimant's decision to limit himself to 20 hours per week is a self-limiting determination. Dr. Zimmerman acknowledged after his examination that he contained no such limitation in his report. Likewise, Dr. Fevurly acknowledged that he, in no way, limited claimant to less than 40 hours per week.

This Board Member acknowledges that Dr. Fevurly did testify that if claimant is able to work 20 hours a week, but not the second 20 hours, then he would say that claimant is incapable of coping with the pain and unable to perform the job tasks for that second 20 hours. However, Dr. Fevurly went on to testify that he thinks claimant is qualified to work as many hours and drive as many miles as he did prior to his injury and the restriction at 20 hours per week is not a medical restriction, but a self-imposed restriction utilized by claimant.

This Board Member would find that this claimant is capable of working 40 hours per week at $0.35 per mile, which would equate to a wage equal to or greater than 90 percent of the average weekly wage claimant was earning at the time of his injury. Therefore, under K.S.A. 44-510e, this claimant should be limited to a functional impairment.

BOARD MEMBER

DISSENT

I would grant respondents' request for an extension of their terminal date to take the deposition testimony of their medical expert, Dr. Poole.

BOARD MEMBER

c: Frederick J. Patton, II, Attorney for Claimant
Nathan D. Burghart, Attorney for Respondents and their Insurance Carriers
Patrick R. Barnes, Attorney for Respondent (Soldier Creek)
Bryce D. Benedict, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director